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13 YELP INC.

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION
17

18 JONATHAN SAPAN, individually and on
Behalf of All Others Similarly Situated,

19 Plaintiff,

20 vs.

21 YELP INC., a Delaware Corporation,

22 Defendant.
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Case No. 3:17-cv-03240-JD

**DEFENDANT YELP INC.'S REPLY IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

Hearing:

Date: April 5, 2018

Time: 10:00 a.m.

Dept.: 11

Judge: Honorable James Donato

Complaint Filed: June 6, 2017

1 **I. INTRODUCTION**

2 Plaintiff Jonathan Sapan’s (“Plaintiff”) registration of his Yelp account and continuous use of
3 Yelp over hundreds of days, during which he repeatedly agreed to Yelp’s Terms of Service, posted
4 dozens of reviews of businesses, flagged other users’ reviews, made suggested edits to Yelp business
5 pages, used Yelp’s direct messaging feature, and used other Yelp features—many available only to
6 registered users like Plaintiff—created an established business relationship (“EBR”) with Yelp Inc.
7 (“Yelp”). This EBR is an exception to liability under the TCPA’s plain language.

8 Although an EBR can be based solely on a single non-monetary transaction between parties,
9 here the parties have a long history of engagement. Since 2013, Plaintiff has used Yelp on nearly 500
10 different dates (again reiterating his agreement to the Yelp Terms of Service each time he logged in),
11 authored and posted 42 reviews, voted or received votes on his reviews 121 times, sent invites to
12 make friends on Yelp seven times, messaged other users eight times, flagged eight reviews authored
13 by other users, suggested edits to Yelp business pages five times, and even visited the Tierrasanta Pro
14 Roofing Yelp business page that allegedly displayed his phone number five times prior to bringing
15 this action. These continuous transactions between the parties form an EBR.

16 Additionally, the FCC specifically notes that a publisher-subscriber relationship, such as the
17 one between Yelp and Plaintiff, forms an EBR, and, the FCC and case law make clear that no sale or
18 exchange of funds are necessary for this relationship to exist.

19 Accordingly, Yelp and Plaintiff have an EBR, Yelp’s alleged calls to Plaintiff do not give rise
20 to a claim, and this matter must be dismissed in its entirety.

21 **II. ARGUMENT**

22 **A. A Publisher-Subscriber Relationship Forms an EBR**

23 The Federal Communications Commission (“FCC”) specifically identifies the publisher-
24 subscriber relationship as an example of an EBR. *In the Matter of Rules and Regulations*
25 *Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8771, ¶ 35 (1992).
26 Plaintiff’s unsupported contention that the “publisher-subscriber relationship referred to paying
27 subscribers to print publications” (Opp., p. 12:10-11) is entirely unsupported and contrary to case law.

1 In *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443 (7th Cir. 2010), CE Design brought
2 suit against Prism Business Media, Inc. (“Prism”), a media company that published trade magazines,
3 under the TCPA. *Id.* at 445-46, *affirming CE Design Ltd. v. Prism Business Media, Inc.*, 2009 U.S.
4 Dist. LEXIS 70712 (N.D. Ill. Aug. 12, 2009). Although CE Design had never bought any services
5 from Prism or sold any services to Prism, the Court found that the parties had an EBR because CE
6 Design subscribed to three of Prism’s free publications. *Id.* at 451 (“And because Prism and CE
7 Design’s publisher-subscriber relationship falls within the scope of business relationships the FCC
8 intended the EBR defense to cover, we also agree that the EBR exemption applies in this case.”)

9 The publisher-subscriber relationship between Plaintiff and Yelp is even stronger than the
10 relationship in *CE Design, Ltd.*, because internet services like Yelp now enable subscribers like
11 Plaintiff to not only consume published content, but to also add their own content and directly interact
12 with the service and other subscribers (*e.g.*, befriend other subscribers, message other subscribers,
13 receive emails from the service, and report content contributed by others to the service).

14 Furthermore, despite Plaintiff’s contentions to the contrary, Yelp’s reliance on Section 230 of
15 the Communications Decency Act¹ in cases concerning alleged liability for third-party content is
16 irrelevant to this action. Here, Plaintiff is attempting to hold Yelp liable for making phone calls. All
17 that is relevant for this case is that courts have unanimously found Yelp to be a “publisher.” *Kimzey*,
18 836 F.3d at 1268; *Levitt v. Yelp! Inc.*, 2011 U.S. Dist. LEXIS 124082, at *28 (N.D. Cal. Oct. 26,
19 2011), *aff’d* 765 F.3d 1123 (9th Cir. 2014); *Yelp Inc. v. Superior Court*, 17 Cal. App. 5th 1 (Cal. App.
20 2017). Again, Plaintiff provides no case law to suggest that the immunity Congress provided online
21 publishers through Section 230 somehow also precludes an online publisher from forming an EBR
22 with a subscriber.

23 The parties’ publisher-subscriber relationship demonstrates that an EBR exists here and that
24 Yelp is exempted from liability under the TCPA for the calls allegedly placed to Plaintiff.

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27 ¹ Section 230 generally immunizes online publishers from claims based on content created by their
28 users. 47 U.S.C. § 230(c)(1); *see generally*, *Kimzey v. Yelp! Inc.*, 836 F.3d 1263 (9th Cir. 2016).

1 **B. Plaintiff’s Repeated Acceptance of Yelp’s Terms of Service Constitutes**
2 **Transactions between the Parties**

3 In exchange for his ability to use various features on Yelp to which he would not otherwise
4 have access, Plaintiff assented to Yelp’s Terms of Service. MacBean Decl. ¶¶ 9-12. Plaintiff accepted
5 these Terms when he first created his account, and each time that he later logged in to his account.
6 *Id.* The hyperlinked² Terms of Service was visible on the Yelp sign up and login page. *Id.* at ¶¶ 10,
7 11. By clicking the “Sign Up” and “Log In” buttons, Plaintiff “agree[d] to Yelp’s Terms of Service
8 and Privacy Policy” and entered into a binding contract with Yelp. *Id.*; *see Holl v. UPS*, 2017 U.S.
9 Dist. LEXIS 153317, *12 (N.D. Cal. Sept. 18, 2017) (finding that plaintiff had sufficient inquiry
10 notice of Terms even where “users are not provided with a hyperlink, but instead are directed to
11 navigate to ups.com”); *Tompkins v. 23andMe, Inc.*, 2014 U.S. Dist. LEXIS 88068, *29 (N.D. Cal.
12 June 25, 2014) (finding that “[t]he fact that the TOS were hyperlinked and not presented on the same
13 screen does not mean that customers lacked adequate notice” of the contract terms); *Swift v. Zynga*
14 *Game Network, Inc.*, 805 F. Supp. 2d 904, 912 (N.D. Cal. 2011) (enforcing arbitration provision
15 where “Plaintiff was provided with an opportunity to review the terms of service in the form of a
16 hyperlink immediately under the ‘I accept’ button”). Courts have consistently found that such online
17 agreements are valid and enforceable.

18 Plaintiff does not contest that he agreed to Yelp’s Terms of Service each time he logged in to
19 Yelp. *See generally* Opp. Instead he relies on unpersuasive case law to argue that the contract he
20 entered into “cannot be enforceable” (Opp. at 10:21) and that agreeing to the Terms of Service does
21 not constitute a “transaction.” This is incorrect—case law holds that the contract is enforceable and
22 agreeing to Terms of Service is a transaction.

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26 ² Plaintiff claims that the Terms of Service were “linked in browse-wrap fashion,” (Opp. at 10:17);
27 however, Yelp’s Terms of Service are more akin to a click-wrap agreement, where an offeree has an
28 opportunity to review the terms and conditions and must affirmatively indicate assent. *See Specht v.*
Netscape Commc’ns Corp., 306 F.3d 17, 22 n.4 (2d Cir. 2002).

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1 **1. The EBR Should not be Construed Narrowly**

2 Plaintiff fails to provide a single citation to case law to support that the phrase “two-way
3 communications” should be construed so narrowly. “The FCC has opined that the established
4 business relationship exemption is broad and that you have an established business relationship with
5 a person or entity if you have made an inquiry, application, purchase, or transaction regarding
6 products of [sic] services offered by such person or entity.” *Van Patten v. Vertical Fitness Grp., LLC*,
7 2013 U.S. Dist. LEXIS 189845 *24 n.4 (S.D. Cal. Nov. 8, 2013) (citing *Carnett’s Inc. v. Hammond*,
8 610 S.E.2d 529, 531-32 (Ga. 2005)); *see also* 7 FCC Rcd. 8752, 8771, ¶ 35.

9 Accordingly, Plaintiff has an EBR with Yelp based on Plaintiff’s repeated transactions with
10 Yelp. He used Yelp’s messaging system (MacBean Decl. ¶ 22, Ex. K), made reports to Yelp
11 regarding other users’ reviews (*id.* at ¶ 23, Ex. H); posted reviews on Yelp (*id.* at ¶ 19, Ex. H); and,
12 logged in to Yelp and viewed Yelp business pages hundreds of times. *Id.* at ¶¶ 18, 27, Ex. H. Plaintiff
13 engaged in these transactions as a registered user of Yelp’s service, pursuant to his acceptance of
14 Yelp’s Terms of Service. *Id.* at ¶¶ 9-12, Exs. B, C, H.

15 **2. Plaintiff and Yelp Engaged in Two-Way Communications**

16 Regardless, Plaintiff’s contention that Yelp did not participate in a “two-way communication”
17 is incorrect. Yelp sent emails to Plaintiff regarding his Yelp account usage (such as emails about the
18 friend requests he initiated). MacBean Decl. ¶ 26, Ex. H. Also, in response to Plaintiff’s suggested
19 edits to Yelp business pages, live Yelp representatives responded with “emails informing [Plaintiff]
20 of the status of his edits to business pages on Yelp.” *Id.* The same is true when Plaintiff reported
21 other users’ reviews—Plaintiff made the reports and live Yelp representatives evaluated his reports
22 and responded to him accordingly. *Id.*

23 There were also “two-way communications” when the parties exchanged consideration during
24 the creation and continued use of Plaintiff’s Yelp account (*supra* Section B), and each time that Yelp
25 provided results in response to Plaintiff’s search inquiries or otherwise responded to Plaintiff’s
26 actions. Indeed, Yelp communicated regularly to Plaintiff in response to his various requests through
27 the service, such as displaying the dozens of reviews he requested that Yelp show. As other examples,
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1 Yelp also, at Plaintiff’s request, sent invitations to befriend other Yelp users and messages to other
2 Yelp users—benefits Plaintiff could not have requested absent his registration for a Yelp account.
3 Plaintiff and Yelp engaged in voluntary³ two-way communications and an EBR between the parties
4 exists.

5 **D. An EBR Does not Require the Furnishing of a Telephone Number**

6 An EBR is formed “by a voluntary two-way communication between a person or entity and a
7 residential subscriber with or without an exchange of consideration, on the basis of the subscriber’s
8 purchase or transaction with the entity within the eighteen (18) months immediately preceding the
9 date of the telephone call...” 47 CFR 64.1200(f)(5). Neither the TCPA nor any FCC Order mandates
10 that the called party provide his/her phone number to form an EBR. *Id.*

11 Plaintiff confuses the EBR exception with the consent exception. 47 CFR § 64.1200 (c)(2)(ii)
12 (A party making telephone solicitations “will not be liable for violating this requirement if . . . [i]t has
13 obtained the subscriber’s prior express invitation or permission. Such permission must be evidenced
14 by a signed, written agreement between the consumer and seller which states that the consumer agrees
15 to be contacted by this seller *and includes the telephone number to which the calls may be placed . . .*”)
16 (emphasis added). The EBR exception, on the other hand, details no such requirement. *See* 47 CFR
17 § 64.1200(f)(5).

18 It is also possible that Plaintiff confuses the EBR requirement with the extra requirements for
19 exceptions to liability in fax cases under the TCPA. 47 CFR § 64.1200(a)(4)(i), (ii) (Sending
20 unsolicited advertisements to a fax machine violates the TCPA unless, “[t]he unsolicited
21 advertisement is from a sender with an established business relationship, as defined in paragraph
22 (f)(6) of this section, with the recipient; **and** . . . [t]he sender obtained the number of the telephone
23 facsimile machine through” various outlined methods) (emphasis added). The Legislature states that
24 the EBR element is separate and apart from the requirement that a phone number be obtained. *In the*

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26 ³ “Voluntary” is defined as “[d]one by design or intention.” *Voluntary*, Black’s Law Dictionary (7th
27 ed. 1999). Yelp intentionally and by design responded to Plaintiff’s actions through its service, in
28 accordance with Plaintiff’s requests. MacBean Decl. ¶ 26, Ex. H. Yelp’s communications with
Plaintiff were, therefore, voluntary.

1 *Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18
2 FCC Rcd. 19890, 19892, ¶ 5 (Oct. 3, 2003) (heightening standard for exceptions to liability in fax
3 cases) (“[T]he Commission’s determination that an established business relationship will no longer
4 be sufficient to show that an individual or business has given express permission to receive unsolicited
5 facsimile advertisements will go into effect as required by the *Order on Reconsideration*.”).

6 Each the consent and the fax EBR exception clearly delineate that a phone number must be
7 furnished; but, the EBR exception applicable to this case—which does not involve faxes—does not
8 include this extra requirement. 47 CFR 64.1200(f)(5). This was purposeful. “Where Congress
9 includes particular language in one section of a statute but omits it in another section of the same Act,
10 it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or
11 exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983).

12 Plaintiff again fails to cite to any case law supporting his contention that a phone number must
13 be furnished to establish an EBR. Plaintiff’s only citation is to *Satterfield v. Simon & Schuster, Inc.*,
14 569 F.3d 946 (9th Cir. 2009) (Opp. at 9:4-26), which has absolutely no bearing on the instant matter—

15 *Satterfield* discusses only text messages and consent. *Satterfield*, 569 F.3d. at 954-55. The
16 term “established business relationship” does not appear once in the decision. *See generally id.*

17 There is no requirement that a number be furnished during a transaction in order for an EBR
18 to exist. 47 CFR § 64.1200(f)(5). Yelp and Plaintiff have an EBR.

19 **E. Yelp’s Calls to Plaintiff do not Give Rise to Liability**

20 As a final attempt to avoid summary judgment, Plaintiff argues that, regardless of his EBR
21 with Yelp, Yelp’s calls violate the TCPA because “Yelp tried to call somebody else.” Opp. at 9:24-
22 27. The EBR exception does not contain such a requirement, (47 C.F.R. Section 64.1200(c), (f)(5)),
23 and Plaintiff fails to point to any authority supporting his contention. In fact, courts do not discuss
24 the substance of the calls when the parties have an EBR. *Abante Rooter & Plumbing, Inc. v.*
25 *Alarm.com, Inc.*, 2017 U.S. Dist. LEXIS 69307 *19 n.10 (N.D. Cal. May 5, 2017) (finding “[u]nder
26 the relevant FCC regulation, Alarm.com would have an established business relationship (‘EBR’)
27 that permits it to contact individuals who contacted Alarm.com,” without inquiry into subject matter
28

1 of calls); *Hovila v. Tween Brands, Inc.*, 2010 U.S. Dist. LEXIS 34861, *14 (W.D. Wash. April 7,
2 2010) (finding calls do not violate TCPA if parties’ “relationship falls within the EBR exemption to
3 the TCPA” without discussing substance of calls).

4 Furthermore, Yelp’s calls to Plaintiff were regarding Yelp, the very service that gave rise to
5 the parties’ EBR. Plaintiff could easily anticipate a call from Yelp about Yelp. Therefore, Yelp’s calls
6 to Plaintiff do not violate the TCPA.

7 **III. CONCLUSION**

8 Yelp’s calls to Plaintiff did not violate the TCPA. At the time of Yelp’s alleged calls, the
9 parties had an EBR, arising from Plaintiff’s consistent use of Yelp and the parties’ repeated
10 transactions in which Plaintiff agreed to Yelp’s Terms of Service in exchange for his ability to use
11 features of Yelp’s service available only to registered users. Additionally, the parties have a
12 publisher-subscriber relationship, which the FCC has specifically identified as an EBR. The facts
13 and legal authorities indisputably establish that the parties had an EBR. Therefore, Yelp’s alleged
14 calls to Plaintiff cannot give rise to a TCPA violation and Plaintiff has no viable claims here.

15 Yelp respectfully requests that this Court grant its Motion for Summary Judgment.

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17 Dated: March 21, 2018

Respectfully submitted,

18 MINTZ LEVIN COHN FERRIS GLOVSKY AND
19 POPEO P.C.

20 /s/ Nicole V. Ozeran

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